COPY

No. 3 —

In the Supreme Court of the United States

OCTOBER TERM, 1960

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., PETITIONERS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. LEE RANKIN,
Solicitor General,
DALLAS S. TOWNSEND,
Special Assistant to the Attorney General,
RALPH S. SPRITZER,
Assistant to the Solicitor General,
IRVING JAFFE,
Attorney,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Rule involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	13
Appendix A	14
Appendix B	27

CITATIONS

Cases:

Interhandel Case, Judgment of March 21, 1959, I.C.J. Reports 1959, p. 6	6
Kaufman v. *Societe Internationale*, 343 U.S. 156	3
LaBuy v. *Howes Leather Co.*, 352 U.S. 249	2, 7, 8, 9
Maxwell v. *Enterprise Wallpaper*, 131 F. 2d 400	11
Simmons Co. v. *Grier Bros.*, 258 U.S. 82	11
Societe Internationale v. *Rogers*, 357 U.S. 197	3, 5, 7, 12
United States v. *Kirkpatrick*, 186 F. 2d 393	10
United States v. *Swift & Co.*, 286 U.S. 106	11

Statutes and Rule:

Trading with the Enemy Act, as amended, Section 9(a) (40 Stat. 419, as amended, 50 U.S.C. App. 9(a))	3
28 U.S.C. 1292(b)	6
Federal Rules of Civil Procedure:	
Rule 53	2, 10, 13
Rule 53(b)	2, 7, 8

Miscellaneous:

Report to the Judicial Conference, 13 F.R.D. 62 ..... Page 8

Proceedings of the Seminar on Protracted Cases, 21 F.R.D. 395 8

Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Col. L. Rev. 452 (1958) 8

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., PETITIONERS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Attorney General and the Treasurer of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on April 14, 1960.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (J.A.[1] 147–152; App. B, *infra*, pp. 27–32) is unreported. The opinion of the Court of Appeals (App. A, *infra*, pp. 14–24) is reported at 278 F. 2d 268.

[1] "J.A." refers to the joint appendix filed in the court below.

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, p. 25) was entered on April 14, 1960. A timely petition for rehearing *en banc* was denied on May 11, 1960 (App. A, *infra*, p. 26). The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Black, on August 4, 1960, to and including September 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the refusal of the courts below to modify a prior order of reference so as to provide that this case shall ultimately be tried before a District Judge, rather than before a master, constituted an abuse of discretion and a departure from principles established by this Court in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249.

RULE INVOLVED

Rule 53 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

* * * * *

> (b) *Reference.* A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.
>
> * * * * *
>
> (e) *Report.*
>
> * * * * *

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. * * *

* * * * * *

STATEMENT

Respondent, a Swiss corporation (I.G. Chemie), instituted suit in October 1948 under Section 9(a) of the Trading with the Enemy Act, as amended (40 Stat. 419, as amended, 50 U.S.C. App. 9(a)), to recover property seized by the Alien Property Custodian consisting of approximately 93% of the stock in General Aniline & Film Corporation, New York, valued at more than $100,000,000, and cash of approximately $2,000,000 (J.A. 17–33). Petitioners' answer challenges respondent's claim of ownership and alleges that respondent is an enemy and enemy-tainted, without standing to maintain the action (J.A. 34–55). See *Societe Internationale* v. *Rogers*, 357 U.S. 197. The respondent-intervenors represent some 1,700 stockholders of respondent who have intervened, pursuant to this Court's decision in *Kaufman* v. *Societe Internationale*, 343 U.S. 156, to assert rights in the seized assets proportionate to their stockholdings in I.G. Chemie.

On January 18, 1949, petitioners moved for the designation of a Special Judge to hear and superintend all matters in this case preliminary to trial (J.A. 56–57). That motion was denied without prejudice on July 5, 1949 (J.A. 64). In the course of argument on motions relating to depositions and discovery in April 1949 and January 1950, the late Chief Judge

Bolitha J. Laws, *sua sponte*, suggested the appointment of a Special Master, expressing doubt as to whether he could, as a matter of law, designate a Special Judge (J.A. 58–64, 67–74). On February 14, 1950, Chief Judge Laws appointed a Special Master to whom was referred "the determination and findings of all issues of facts and law involved in said action" (J.A. 74–76). Petitioners consented to the appointment of the Master (J.A. 162). Respondent opposed it (J.A. 76–78). On January 4, 1951, less than a year after the appointment of the Special Master, Chief Judge Laws designated Judge (now Chief Judge) David A. Pine as Special Judge for this case.

After his appointment, the Special Master presided over a lengthy deposition, which was concluded in May 1950. On October 31, 1950, petitioners moved to dismiss the complaint by reason of respondent's failure to comply with an order of production entered on July 5, 1949 (J.A. 79). The motion to dismiss was granted by the District Court on December 21, 1953 (J.A. 100). The Court of Appeals affirmed the dismissal on June 30, 1955, but granted respondent an additional six months within which to comply with the order for production (225 F. 2d 532). This Court denied a petition for a writ of certiorari (350 U.S. 937). On August 3, 1956, after the expiration of the six months' period granted by the Court of Appeals, the District Court entered an order upon the mandate of the appellate court affirming its original dismissal. The Court of Appeals again affirmed (243 F. 2d 354). This Court thereupon granted re-

spondent's petition for a writ of certiorari (355 U.S. 812), and, on June 16, 1958, reversed the dismissal of the complaint and remanded the case to the District Court for further proceedings (357 U.S. 197).

Between the date of the appointment of the Master in February 1950 and the granting of the motion to dismiss by the District Court in 1953, the Master presided over one deposition and heard motions in four discovery matters. The Master also presided over a hearing to ascertain respondents' good faith in complying with the order for production, but this proceeding was conducted under a separate order of reference dated March 1, 1951 (J.A. 86), and not under the order of reference here in question. On May 12, 1953, on respondent's motion, proceedings before the Special Master were stayed by order of the District Court (J.A. 99a). The Master was thereafter occupied solely with matters concerning discovery and with questions pertaining to the intervenors rather than respondent (J.A. 4–16, 87, 102, 105, 112, 123, 125, 174–177 202–204, 214–216). At no time has the Master been called upon to hear or determine any issues of fact raised by the pleadings in this litigation.

On October 1, 1958, shortly after this Court's reversal of the order dismissing the complaint and its remand for further proceedings, the Government moved in the District Court for an order terminating the reference to the Special Master or, in the alternative, modifying it so as to confine the Special Master's authority to the conduct and supervision of discovery proceedings and depositions (J.A. 135). The por-

tion of the motion addressed to complete termination of the reference was subsequently abandoned (J.A. 136, 149). The District Court denied the motion by order dated March 9, 1959 (J.A. 155–156) for reasons stated in its oral opinion of February 6, 1959 (J.A. 147–152; App. B, pp. 27–32). Leave to take an interlocutory appeal pursuant to 28 U.S.C. 1292(b) was granted by the Court of Appeals on April 16, 1959. The Court of Appeals affirmed (Judge Fahy dissenting) on April 14, 1960.

REASONS FOR GRANTING THE WRIT

The upshot of the decision below is that this case, which [redacted] involves a great sum of money and is "of large importance, with international as well as domestic ramifications." (the quoted words are Judge Fahy's, App. A, p. 23), must be tried in its entirety before a master, rather than by a United States District Judge. The issues to be thus determined are not only difficult and treacherous—involving as they do the formation of judgments as to whether complex business and financial transactions were *bona fide* dealings or were the expression of a devious purpose to "cloak" the assets of I.G. Farben—but must be resolved in a context which makes the task facing the trier of the facts an especially demanding one. The evidence which might prove most telling in this case may never be seen; papers which are in the possession of respondent's house bank may remain shrouded as a result of the operation of Swiss bank secrecy and economic

[2] As to issues which have been placed before the International Court of Justice, see *Interhandel Case*, Judgment of March 21, 1959, I.C.J. Reports 1959, p. 6.

espionage laws. In the absence of full disclosure, as this Court recognized in its prior opinion (357 U.S. at 212–213), it will become necessary not only to evaluate the proof which *is* offered, but to draw inferences on the basis of what has *not* been tendered. If documents that might prove relevant remain unexamined by the Government's attorneys and by the court and if, at the same time, respondent is not to "profit through its inability to tender the records called for" (*id.* at 212), then truly this is peculiarly a case which should be tried by an experienced member of the federal judiciary.

We believe that the failure to provide for trial before a District Judge upon completion of the pre-trial proceedings (which are still in progress) is not only an improper disposition because of circumstances which compellingly argue that an experienced trial judge is peculiarly needed, but that this disposition is irreconcilable (as Judge Fahy concluded in his dissent, App. A, p. 21) with this Court's decision in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249.[3] It is

[3] The Court of Appeals affirmed the District Court, it should be noted, because it thought that reference of this case to a master was permissible under the standards laid down in *LaBuy*. It did not rest its judgment on the theory that the Government had waived its right to object. See App. A, p. 20.

The District Court, on the other hand, believed that, as an original matter, reference of this case to a master would be contrary to Rule 53(b), but was of the view that the Government had waived its rights. App. B, pp. 28–31. We shall point out (pp. 11–13, *infra*) that this is erroneous and that the District Court's basis of decision does not provide an adequate ground for sustaining the judgment below if it should be concluded that the Court of Appeals misconstrued the principles of *LaBuy*.

obvious, moreover, as all of the judges of the Court of Appeals were agreed, that the matter at issue is one which should be determined at this juncture since it will plainly control the entire future course of the litigation.

1. The core of the Court of Appeals' decision is that reference to a master was appropriate in this case because it is a big and intricate lawsuit. We submit that the premise is correct and the conclusion wrong. There are, to be sure, intricate and detailed matters which are appropri[illegible] for reference to a master—typically, matters which involve computation or accounting. Note the reference in Rule 53(b) to "matters of account." But the fact that the ultimate issue to be determined may require introduction of an unusually large quantum of evidence and may call for an assessment of many intercorporate transactions—features which are, of course, common to every large antitrust case—does not support the conclusion that the case is one to be tried in its entirety by a master.[4] That is the plain teaching of *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, an antitrust case in which it was sought to justify the reference on precisely the grounds which were accepted by the

[4] The conduct of the protracted case has been the subject of a seminar in August 1957 co-sponsored by a committee of the Judicial Conference and a committee of judges appointed by the Chief Justice of the United States (21 F.R.D. 395). The Prettyman Report, endorsed and adopted by the Conference and the seminar, expressed the opinion that "big" cases should not be referred in their entirety to masters (13 F.R.D. 62 at page 83; 21 F.R.D. 395 at page 521). See, also, Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Col. L. Rev. 452, 458–459 (1958).

court below. Holding that Judge LaBuy had exceeded his authority in ordering a reference, this Court stated (p. 259):

> But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court. On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work. Nor does petitioner's claim of the great length of time these trials will require offer exceptional grounds.[5]

The opinion below also suggests (App. A, pp. 17–18) that this case is distinguishable from *LaBuy* because Chief Judge Laws proceeded deliberately and cautiously before deciding to refer the case. We agree that Judge Laws did not reach his decision lightly. We agree, moreover, that there were persuasive considerations supporting reference of a portion of the case—the detailed and lengthy pre-trial proceedings involving, *inter alia*, the exchange of many thousands of documents—to a special master. But this does not

[5] The stockholders of the plaintiff did not intervene in the instant case until 1952, some two years after the entry of the order of reference, and, therefore, could not have been a factor considered by Judge Laws. In any event, the *LaBuy* case had some 93 plaintiffs and a dozen defendants at the time the petition for mandamus was filed. Nor is it apparent why the number of parties to a lawsuit should of itself create an exceptional condition with respect to the trial of the issues of fact. Moreover, the claims of the intervenors are secondary to the main litigation for, should respondent prevail, the intervenors have no claims at all.

answer the question whether it is now appropriate to insist that the trial itself—which is still many months in the future[6]—be conducted by the master. It is notable that the exceptional conditions cited in Judge Laws' order of reference relate solely to the complexities which had arisen in connection with the pre-trial proceedings, *i.e.*, the production of documents and the taking of depositions from foreign witnesses. See J.A. 74–75. Yet it appears clear that a *trial* may be conducted by a master only when the exceptional conditions to which Rule 53 refers relate to the issues raised by the pleadings, not simply to the preliminary proceedings. *United States* v. *Kirkpatrick*, 186 F. 2d 393 (C.A. 3).

There is another flaw in the decision below. The Court of Appeals holds that this case has exceptional features (in the sense of Rule 53) and that therefore it was not an abuse of discretion for Judge Pine to refuse to modify the order of reference. But the plain fact is that Judge Pine did not purport to exercise discretion. Indeed, he found that reference of this case for trial by a master was not consistent with Rule 53, but that the Government had waived any right to object. On the assumption indulged by the Court of Appeals, *i.e.*, that the Government's plea for modification raised an issue of discretion, the

[6] Pre-trial proceedings are still in progress and the parties, at the same time, are actively preparing for trial; although matters have not yet reached the stage where it is practicable to set a trial date. There appears, at the present time, to be little or no likelihood of settlement of the litigation. It is expected that the case will have to be tried on its merits.

decision below suffers from the defect that such discretion must be exercised initially by the District Court, and not by the Court of Appeals. *Maxwell* v. *Enterprise Wallpaper*, 131 F. 2d 400, 403 (C.A. 3).

2. The Government did not, as Judge Pine believed, waive its right to object.

An interlocutory order prescribing a method of procedure is not a binding contract which precludes a party, who initially consented to the order from seeking a modification at any time or in any circumstances. Even a *final* consent judgment or decree which determines *substantive* rights may be modified in appropriate circumstances. *United States* v. *Swift & Co.*, 286 U.S. 106, 114–115. If the District Court believed (as Judge Pine did) that the order of reference was contrary to the purposes of Rule 53, it was incumbent upon the court to set matters right, *Simmons Co.* v. *Grier Bros.*, 258 U.S. 82, at least where it appeared that modification would not cause prejudice to any party and that altered circumstances reinforced the prayer for relief.

We stress that the functions of the master here have been thus far confined to the supervision of discovery proceedings and depositions, and that he has not heard or considered any issues of fact raised by the pleadings. As Judge Fahy stated in his dissent (App. A, pp. 20–21):

> * * * Nothing heretofore done by the master would be set aside by the modification requested. Nor would additional pretrial matters which lie in the future be removed from the master's jurisdiction. It is the actual trial itself, still

to be held, that would be restored to the responsibility of the court.

We emphasize further that there has been a most significant change of circumstances since the order of reference was originally entered. At that time, the Government believed that discovery would be a two-way street and that the United States, which was prepared to make full disclosure to respondent (as it has since done), would enjoy, for its part, the benefits of full production by respondent. Respondent, as matters have developed, has not made a complete disclosure, and, for aught that appears, the most vital clues to respondent's affairs may be contained in the banking records which remain inaccessible. It is one thing to make out the defense of "cloaking" when one is able to demonstrate by documentary proof the full story of the economic and financial arrangements made. It is quite another matter to show that transactions are colorable when the party asserting their *bona fides* is in a position to draw the veil upon vital aspects of the dealings. To the extent that documentation is incomplete, there is a correspondingly greater need for passing upon questions of testimonial credibility and a far larger role for inference. This Court has already recognized that trial of this case without full disclosure by respondent creates serious and novel problems. 357 U.S. at 212–213. Thus, it observed (p. 213) that "in the absence of complete disclosure by [respondent], the District Court [might] be justified in drawing inferences unfavorable to [respondent] as to particular events." We submit that it has become vitally important to the proper conduct of the litigation that both judgments as to credibility and the

drawing of inferences from the record be made in the first instance by a trial judge, and that he should not view the case, one step removed, under the formidable limitations imposed by the "clearly erroneous" rule.[1] Certainly, when this case was initially referred to a master, it could not have been contemplated either by Judge Laws or by the parties that it would involve the kind of trial which has now become necessary as a result of supervening developments.

CONCLUSION

The District Court has reached the plainly erroneous conclusion that, although this case is one which should be tried by a District Judge, the court is now powerless to direct that course. Court of Appeals has ruled, on the other hand, that this is the type of case which it is appropriate to refer, in its entirety, to a master—a ruling which, we believe, is in direct conflict with a controlling decision of this Court.

This petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

DALLAS S. TOWNSEND,
Special Assistant to the Attorney General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

IRVING JAFFE,
Attorney.

SEPTEMBER 1960.

[1] It may be added that this Court's *LaBuy* decision, clarifying Rule 53, was itself a change in circumstance justifying reconsideration of the order of reference.

APPENDIX A

1. *Opinion of the Court of Appeals*

United States Court of Appeals for the
District of Columbia Circuit

No. 15017

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., APPELLANTS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL., APPELLEES

APPEAL FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided April 14, 1960

Before WILBUR K. MILLER, FAHY and DANAHER,
Circuit Judges

DANAHER, *Circuit Judge:* This unique case brought by a Swiss holding company sometimes known as I. G. Chemie or Interhandel [plaintiff], was instituted in October, 1948 under the Trading with the Enemy Act, 50 U.S.C. App. § 9(a), 40 Stat. 419, as amended, against the Attorney General, as successor to the Alien Property Custodian, and the Treasurer of the United States [herein Government]. Hun-

dreds of plaintiff's stockholders intervened.[1] Thereafter, many variously contested proceedings resulted in hearings before each of several District Judges. Chief Judge Laws was finally impelled, *sua sponte*, to consider the appointment of a special master. The record shows that he had consulted his District Judges and had canvassed his plan with counsel. He asked that Chief Judge Knox in the Southern District be consulted to ascertain his practice. Plaintiff's counsel objected to a reference of the case to a special master and formally opposed his appointment. It was argued that the many issues should be decided by a judge and that the reference was beyond the power of the court.

Chief Judge Laws ordered a pretrial hearing whereat counsel could be fully heard. The parties were requested to file proposed orders designed to accomplish the result outlined by Chief Judge Laws. The Government submitted its proposed order. It asked that there be included a provision that "The master's report shall contain findings of fact and conclusions of law," and further that "The master's findings of fact shall have the force provided in Rule 53(e)(2)."

After considering the existence of need based upon the protracted testimony of witnesses in the United States as well as abroad, and other matters, and finding "exceptional circumstances," Chief Judge Laws on February 14, 1950 entered his order appointing as special master William J. Hughes, Esquire, to whom he referred "the determination and findings of all is-

[1] As appellees they presently appear in three groups, formed pursuant to the Supreme Court's decision in *Kaufman* v. *Societe Internationale*, 343 U.S. 156 (1952). Some understanding of the nature of the issues still largely unresolved may be gleaned from that opinion.

sues of fact and law involved in said action * * *.'"[2]

Plaintiff's counsel after the order was entered again noted objection to the reference and a year later sought to vacate and revoke the order. Thereupon the Government opposed the plaintiff's motion for revocation contending that the order was entirely proper "in view of the exceptional circumstances of this case." The Government's opposition further noted that "Plaintiff confuses the reference of all issues with their reference for *final decision*. The reference of all issues is permissible, but it is not permissible to refer them for a final decision * * *. The specific mention of Rule 53(e)(2) in the order of reference made it clear that the court was not referring to the Master the making of a final decision. Since, under the order and the Rule, the Master's report will come back to the court for adoption or rejection, no impropriety was committed.'" The court, adopting the position then urged by the Government, denied the plaintiff's motion to vacate the order. Thereafter the respective parties proceeded under the order of reference. More than 140 docket entries reflect various proceedings and the actions taken over the years.

---

[2] The order of reference further read: "The Master shall have all the powers and duties which by law may be conferred upon or exercised by a master. His findings of fact shall have the force provided in Rule 53(e)(2) of the Federal Rules of Civil Procedure. He shall hear and pass upon all motions hereafter filed except motions to vary orders already made, motions to punish for contempt, or other motions which would change the nature of the action or of this reference. He shall attend the taking of all depositions and discovery proceedings where witnesses are to be examined, except upon written stipulation of counsel or order of Court. He shall also have power to redetermine the time of taking depositions and resuming the deposition of Hans Sturzenegger now suspended."

On October 1, 1958, the Government moved that the reference be terminated on the ground that the District Court "lacks authority to continue such reference." Alternatively, it asked that the original order be modified "to limit the scope of the reference and the authority of the Master to the conduct and supervision of discovery proceedings authorized by the Court and depositions." The latter motion came on before Chief Judge Pine who, substantially throughout the interim, had served as special judge. After full hearing and argument, an order was entered denying the Government's motion in its entirety. Judge Pine pronounced his opinion and found as his order recited, that the ruling properly should be reviewed forthwith as coming within the special class of interlocutory orders justifying an immediate appeal, pursuant to 28 U.S.C. § 1292(b) (1958). We allowed this appeal accordingly and are satisfied that the case is properly here.[3]

The Government assails Judge Pine's order as an abuse of discretion. Relying largely upon *LaBuy* v. *Howes Leather Co.*,[4] the Government argues that the factors there predicating the reference greatly outweighed those considerations which actuated Judge Laws' order of reference. In effect, it is thus argued if the *LaBuy* situation could not support a reference as the Supreme Court said, the instant reference must fall.

Quite overlooked is the extreme caution with which Judge Laws explored the situation here before he acted. Obviously familiar with the basic problem as his experience with earlier comparable cases had

[3] Cf. *Milbert* v. *Bison Laboratories*, 260 F. 2d 431 (3 Cir. 1958).

[4] 352 U.S. 249 (1957). There the Court was concerned with the *power* of a Court of Appeals to issue its writ of mandamus to compel a District Judge to vacate certain orders of reference.

taught, he not only did not abdicate the judicial function, but contemplated that the parties should have recourse to the court as to the master's rulings. We think that factually, as we shall show, and under the law which is intended to govern the reference, the circumstances in the instant case are totally different from *LaBuy*.

As the Supreme Court observed in *Societe Internationale* v. *Rogers*,[5] "This issue comes to us in the context of an intricate litigation." We think that if ever there is to be a case presenting itself as "the exception and not the rule,"[6] it is this one. At stake are claims evaluated at more than $100 million, consisting of cash in American banks and about 90% of the capital stock of General Aniline & Film Corporation, control over all of which had been asserted by the Alien Property Custodian as assets "owned by or held for the benefit of" I. G. Farbenindustrie, said to be a German enemy national. Before the Government in 1958 filed the motion now considered, various groups of intervenors, appellees here, over the years had presented their claims. Some 2,488 stockholders were claimants at one time or other, in fact the complaints of some 720 had been dismissed.[7] The action of the corporate appellee, the plaintiff, previously dismissed by us[8] was reinstated by the Supreme Court.[9] This is no *LaBuy* case.

Moreover it is not always so, even when some doubt has been urged, that an order of reference must be

---

[5] 357 U.S. 197, 198 (1958).

[6] Fed. R. Civ. P. 53(b).

[7] Further particulars may be perceived in *Kaufman* v. *Brownell*, 101 U.S. App. D.C. 147, 247 F. 2d 553, *cert. denied*, 355 U.S. 842 (1957).

[8] 100 U.S. App. D.C. 148, 243 F. 2d 254 (1957).

[9] *Supra* note 4; and see as to other complications reaching the courts, cases cited in *Kaufman* v. *Brownell*, *supra* note 7.

vacated. In the *Tendler* case,[10] we noted that the master had conducted eleven hearings over a considerable period of time. Here the litigation has evolved over some twelve years, and rights and the status of many claims and the positions of the respective parties have turned upon what has been done. As Judge Pine observed, "so many actions have been taken that to limit the scope as prayed would change the whole pattern of the proceedings and cause confusion and uncertainty in many aspects of this complicated case which are now impossible to visualize."

The order of reference[11] expressly specifies that the master is to have only the powers and duties "which by law may be conferred upon or exercised by a master." We have heretofore recognized "that it is the trial court in such a case who makes the final determination of all the issues * * *. And in no instance is * * * [the judge] bound by the master's conclusions of law."[12] In our case Judge Pine, as special judge, is and for ten years has been available upon proper application and showing by the parties to grant supervision as to any challenged action. The numerous occasions upon which recourse has been had to the courts demonstrate no lack of remedy if it be necessary to seek guidance.

Again, even as to the master's ultimate report, objections conformably to the Rule shall be subject to hearing, to modification, rejection and even to the receipt of further evidence.[13] Nor should it be over-

---

[10] See *Tendler* v. *Jaffe*, 92 U.S. App. D.C. 2, 203 F. 2d 14, *cert. denied*, 346 U.S. 817 (1953).

[11] *Supra* note 2.

[12] *D. M. W. Contracting Co.* v. *Stolz*, 81 U.S. App. D.C. 334, 336, 158 F. 2d 405, 407 (1946), *cert. denied*, 330 U.S. 839 (1947).

[13] Fed. R. Civ. P. 53(e)(2). And see note 2 *supra*, and 5 Moore, Federal Practice 2968 *et seq.* (1951).

looked that the evidence in the case is largely documentary. Of course, the trial judge in this equity action may apply the rule in *United States* v. *Gypsum Co.*[14] and so may we.[15]

Since we are satisfied for the reasons stated that there was no abuse of discretion by the trial judge, we need not consider the Government's claim that under the Rules no waiver here occurred. We note only that the appellees were the parties who ten years ago opposed and even later sought to revoke the order of reference. The Government then supported the order, as we have seen, and all parties have since acted pursuant thereto.

We find no error.

Affirmed.

FAHY, *Circuit Judge, dissenting:* Insofar as the pretrial features of the case are concerned—including discovery and the taking of depositions here and abroad with rulings incident to the conduct of those proceedings—no modification of the reference of the case to the master is now pressed by appellants. But the reference also includes "the determination and findings of all issues of fact and law involved in said action," so that the master would actually try and initially decide the case. Our question is whether, on appellants' motion of October 1, 1958, the reference should be modified so that the master's duties would not include authority for making determinations and findings on all issues of fact and law. Nothing heretofore done by the master would be set aside by the modification requested. Nor would additional pretrial matters which lie in the future be removed from the master's jurisdiction. It is the actual trial itself, still to be held,

[14] 333 U.S. 364, 395 (1948).

[15] *Dollar* v. *Land*, 87 U.S. App. D.C. 214, 217, 184 F. 2d 245, 248, *cert. denied*, 340 U.S. 884 (1950).

that would be restored to the responsibility of the court.

At the time of the original reference the defendants who were the predecessors of the present appellants sought the reference in its broad scope. Appellees then opposed it. Thus, the positions of the parties have changed. Appellants now seek modification; appellees now defend the reference in its original scope. I attach little importance to this reversal of positions, especially as the modification now sought would not undo the past, or indeed alter the future course of the case except as to the basic determinations and findings. These I think should be made initially by the court, not by a master whose findings of fact would bind the court unless clearly erroneous. Rule 53(e)(2) Fed. R. Civ. P.

I am not able to reconcile the contrary view with the decision of the Supreme Court in *LaBuy v. Howes Leather Co.*, 352 U.S. 249, rendered subsequent to Chief Judge Laws' order of reference. In *LaBuy* the Court upheld the Court of Appeals in using the extraordinary writ of mandamus to require a District Judge to vacate orders of reference in an antitrust action.[1] The references covered the taking of evidence, trial of the case, and the preparation of findings of fact and conclusions of law. In holding that the District Court had abused the discretion available to it under Rule 53(b), the Court said the references

> amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation.[1]

[1] 352 U.S. at 256. Mr. Justice Brennan wrote a dissenting opinion in which Mr. Justice Frankfurter, Mr. Justice Burton and Mr. Justice Harlan joined. The dissent, however, was limited to the use of the extraordinary writ of mandamus at an interlocutory stage of the case—a question not involved in the

Moreover, no exceptional circumstance within the meaning of Rule 53(b) was found in *LaBuy* to reside in court congestion in itself, as to which the Court said,

> if such were the test, present congestion would make references the rule rather than the exception.

352 U.S. at 259. Nor did the fact that the case had "unusual complexity of issues of both fact and law," or the circumstance that the trial would be prolonged, create "some exceptional condition" within the meaning of the reference Rule. As to those characteristics of the case the Court said:

> But most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court. On the contrary, we believe that this is an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work. Nor does petitioner's claim of the great length of time these trials will require offer exceptional grounds.[2]

When I apply these principles to our case I am unable to make a reasoned distinction in favor of the broad scope of the present reference. Indeed, this case seems more clearly than *LaBuy* one for trial by and in a federal court, rather than by a master.

---

instant case, since the interlocutory appeal is before us in appropriate manner under 28 U.S.C. § 1292(b) (1958).

[2] 352 U.S. at 259. The Court agreed, however, that the detailed accounting required in the case to determine the damages suffered by each plaintiff might be referred to a master after the court had determined the question of liability of all defendants, "provided the circumstances indicate that the use of the court's time is not warranted in receiving the proof and making the tabulation." *Ibid.*

especially under the limitations a trial by a master would impose upon the final conclusions of the court as to the facts, by reason of Rule 53(e)(2).

The case is one of large importance, with international as well as domestic ramifications.[3] The sound solution would seem to be to permit the master to conclude the pretrial proceedings, with such court supervision as from time to time may be necessary, and then for the trial itself to come on before the court. While the case has exceptional features, and the aid of the master I think is properly utilized, there is no such exceptional condition affecting the basic issues to be determined, chiefly that of enemy taint, as justifies the court in referring those issues to the master.

The clear teaching of *LaBuy*, as it seems to me, is that "some exceptional condition," as that restrictive term is used in Rule 53, is not met by a showing that the case is an exception to the general run of litigation in that it is complex and will take a great deal of time.[4] Nor, as we have seen, does court congestion in itself create the exceptional condition essential to support a reference. A condition which justifies a reference, either of the whole or a part of a case, must be exceptional in the sense of being peculiarly appro-

---

[3] For the prior judicial history of the litigation see *Societe Internationale* v. *McGrath*, 86 U.S. App. D.C. 157, 180 F. 2d 406; *Kaufman* v. *Societe Internationale*, 88 U.S. App. D.C. 296, 188 F. 2d 1017; *rev'd*, 343 U.S. 156; *Societe Internationale* v. *Brownell*, 96 U.S. App. D.C. 232, 225 F. 2d 532, *cert. denied*, 350 U.S. 937; *Societe Internationale* v. *Brownell*, 100 U.S. App. D.C. 148, 243 F. 2d 254, *rev'd. sub nom. Societe Internationale* v. *Rogers*, 357 U.S. 197; *Kaufman* v. *Brownell*, 101 U.S. App. D.C. 147, 247 F. 2d 553, *cert. denied*, 355 U.S. 842; *Interhandel Case*, [1959] I.C.J. Rep. 6.

[4] A great deal of time is in fact being saved by the proper use of the master in the pretrial proceedings.

priate for initial disposition by a master, rather than being of a nature inherently and predominantly appropriate for the exercise of a court's own decisional function. The case of *Tendler* v. *Jaffe*, 92 U.S. App. D.C. 2, 203 F. 2d 14, *cert. denied*, 346 U.S. 817, is perhaps illustrative of a proper reference, though that case too was decided before *LaBuy*. Rule 53 itself is also suggestive in its mention of accounting as an appropriate matter for reference. One need not attempt in the abstract to enumerate illustrations, for the problem before us is a concrete one. As to that problem, I do not find any exceptional condition which justifies turning to a master for determinations or findings with respect to the basic issues in the case. Those are for decision by the court, free of the "clearly erroneous" restriction of Rule 53(e)(2). In the end this would be the most satisfactory manner of disposing of this case, and I think it is as well the required manner.

I would reverse and remand.

2. *Judgment of the Court of Appeals*

United States Court of Appeals for the District of Columbia Circuit

---

No. 15017—September Term, 1959

Civil 4360–48

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL., APPELLANTS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL., APPELLEES

Appeal from an Interlocutory Order of the United States District Court for the District of Columbia.

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the order of the District Court on appeal in this cause is affirmed.

Per CIRCUIT JUDGE DANAHER.

Dated April 14, 1960.

Separate dissenting opinion by Circuit Judge Fahy.

3. *Order of the Court of Appeals denying rehearing*

United States Court of Appeals for the District of Columbia Circuit

No. 15017—September Term, 1959

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC., AND ERIC G. KAUFMAN, ET AL., APPELLEES

Before PRETTYMAN, Chief Judge, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges, in Chambers

Order

Upon consideration of appellants' petition for a rehearing in banc and of the opposition thereto, it is

ORDERED by the court that the petition for rehearing in banc is denied.

Per Curiam.

Dated May 11, 1960.

Circuit Judge BAZELON did not participate in this order.

APPENDIX B

Oral Opinion of the District Court

The COURT: Gentlemen, as I stated at the outset of the arguments, I previously had an opportunity to to read the extensive and helpful briefs which were submitted. I also had the opportunity of reading what I believe to be the relevant portions of the record, although, as I told you, the record is very confused and some parts of it are not in this courthouse. I have also had the advantage of helpful arguments which have assisted me greatly, and I have, also, had the advantage of two hours in my chambers when I had time to think which is a rare privilege these days of expedited justice, and I am now ready to rule because I do not want it said that this case has been prolonged by procrastination of this judge, and I do not think the record shows any procrastination at any time on my part.

Now, the defendants have moved for an order terminating the reference to a special master for determination and findings on all issues of fact and law. The reference was made under an order entered February 14, 1950. The ground for the motion is that the Court lacks authority to continue the reference. In the alternative defendants move for an order modifying the order of reference to limit its scope and the authority of the master to the conduct and supervision of discovery proceedings.

I shall first consider the primary motion for a termination of the order of reference in its entirety. As stated, it is based on the ground that the court lacks authority to continue it. This presupposes a conclu-

sion that the court had authority to order the reference at the time it was ordered, but that the authority is lacking now. This in turn presupposes a conclusion that there has been a change in the law, and this appears to be the view of defendants when they state in their Points and Authorities that since the decision in the LaBuy case on January 14, 1957, the appointment of a master to hear a non-jury case in its entirety "may well constitute an abridgment of litigants rights." Furthermore, this is borne out by the fact that defense counsel stated that at the time of the appointment of the master in this case, the law on the subject was largely "unsettled." Therefore, their position seems to be, particularly as they do not move to vacate the order ab initio, that the court now lacks the "authority to continue the order" because of the LaBuy decision, and that the Court should proceed on a new basis henceforward and leave undisturbed what has been done before.

However, I do not agree that there has been a change in the law, for as I read the Federal Rule involved and the authorities, the opinion in the La Buy case did no more than restate and crystallize the law as it previously existed. Entertaining that view, if I terminated the reference, it would not be on the basis that the court now lacks authority, but necessarily on the basis that the Court lacked authority at the time the order was entered. The corollary of that would be that all the acts and decisions of the special master during the last nine years would be without authority and, therefore, a nullity, and would have to be reconsidered and decided by the court.

It is my opinion that the reference to the master in circumstances like the present would be contrary to the Federal Rule involved, if made over the objec-

tion of the parties, but certainly the rule can be waived, as the right to trial by jury, a right of the highest dignity, can be waived by the parties. Here the defendants consented to the order of reference, acquiesced in the order for over eight years, about two of which were after the decision in the La Buy case, during which time the master has made many decisions on many matters involving substance as well as procedure, and, also, defended the order of reference against challenge by the plaintiffs in the year 1951, I believe.

It is hardly conceivable that defendants can now take advantage of plaintiff's initial objection to the order. There has, therefore, been a waiver by defendants, both express and implied, and acquiescence, and opposition to efforts to have it set aside over a long period of years constituting a waiver by them of their right to have the issues decided initially by the Court.

So far as the plaintiffs are concerned, they objected to the entry of the order at the time it was made on grounds substantially the same as those now being made by the defendants. Now, however, the plaintiffs have reversed their position and are defending the reference against the challenge by defendants and thereby themselves now consent and acquiesce and have indeed acquiesced therein since 1951, and have waived their rights since that time.

I am, therefore, of the opinion that all parties to this controversy are now in a position where they may not challenge the order of reference because in law and in fact there has been a consent thereto and the primary motion to terminate the reference as of this time should be denied. I should also state, however, that defendants, in the oral argument, took the position they were not pressing the primary motion.

I shall now take up the alternative motion to limit the scope of reference to the conduct and supervision of discovery proceedings. The same reasoning applies to this alternative motion as applies to the primary motion except if the order of reference had in the beginning been limited in the manner now desired by defendants, it would not have been contrary to the Federal Rule involved and would have been sustainable with or without consent. However, in so limiting it I would otherwise terminate the order of reference, objection to which, as above stated, has been waived. In addition to all else, such an order would be similar to changing the rules in the middle of the game, which I think is frowned upon in many quarters, and so many actions have been taken that to limit the scope as prayed would change the whole pattern of the proceedings and cause confusion and uncertainty in many aspects of this complicated case which are now impossible to visualize. Too much water has gone over the dam to justify such a modification now.

In addition, the master has acquired, over the years, an extensive familiarity with the case which would be forever lost if I granted the alternative motion and this should weigh in the scales if defendants are correct in their argument that the ruling of the Court on their motion involves the exercise of discretion. I, therefore, deny the motion for alternative relief.

To sum up, assuming the order standing alone would have been contrary to the Federal Rule in question, the acts and conduct of the parties over the years after the order of reference constitute a waiver of the rule and consent to the reference, and there should be no change in the established order of procedure at this time. An act in assumed contravention of the rule does not make it a nullity when done under the circumstances here presented which constitute, as

I said, a waiver and consent, and defendants concede the matter is not jurisdictional, and that the use of the words "lacking in authority" in their motion were not well chosen. This disposition is further supported by the opinion of the U.S. Court of Appeals for the District of Columbia Circuit, in Parker against Sager, 174, Fed 2d, 3 and 4, where the Court said among other things, as follows:

> The brief of amici curiae asserts further that Sager is as a matter of law forbidden to take the inconsistent legal positions assertedly taken by him as above set forth. But the rule that a party is not permitted to maintain inconsistent legal positions in judicial proceedings is, according to the better view, subject to the limitation, among others, that the legal position first asserted must have been successfully maintained.

That is certainly applicable in this case. Now, that is my ruling, gentlemen. I realize it is a far reaching one if I should be in error and every nisi prius judge these days should realize there is always a strong possibility that he is.

I suggest that counsel consider this recent legislation of Public Law 85-919, approved on September 2, 1958. It appears on page 6763 of the 18 Supp to the United States Code, which reads as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if

> application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

A great deal of time, energy, and expense as I see it would be lost if I am in error. Because, all that has been done would have to be done over and I suggest to counsel the wisdom in considering that Statute in the light of my opinion.

Will you prepare appropriate order, gentlemen?

(The Court adjourned at 2:20 o'clock, February 6, 1959.)

U.S. GOVERNMENT PRINTING OFFICE: 1959